

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES

EPA-PNL-2996

Palmer Hough/DC/USEPA/US

05/02/2012 01:36 PM

To: Richard Parkin, Tami Fordham, Judy Smith, Sheila Eckman,
Bill Dunbar, Marianne Holsman, Phil North
cc: Jeff Frithsen

bcc

Subject: Source of the King Salmon letter - a DC Lobbying group

Folks:

I went back through me email and back on 10-13-10 a rep from the DC lobbying group (The Livingston Group) that is also representing Pebble apparently met with Greg Peck in OW. As a follow-up to the meeting - the lobbyist sent Greg a bundle of letters including the unsigned letter from King Salmon. Should I call King Salmon to verify the authenticity of this letter?

-Palmer

Palmer Hough, Environmental Scientist
tel: 202.566.1374 | fax: 202.566.1375

Wetlands Division
U.S. EPA Headquarters (MC 4502T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460
www.epa.gov/wetlands

----- Forwarded by Palmer Hough/DC/USEPA/US on 05/02/2012 01:18 PM -----

Brian Frazer

10/13/2010 04:56 PM

To: "Palmer Hough" <Hough.Palmer@epamail.epa.gov>, "Christopher
Hunter" <Hunter.Christopher@epamail.epa.gov>

cc:

Subject: Fw: Follow up and thanks

Fyi

Brian Frazer
Chief, Wetlands & Aquatic Resources Regulatory Branch
O:202-566-1652
C:202-379-6906

Sent from my BlackBerry Wireless Handheld
Gregory Peck

----- Original Message -----

From: Gregory Peck

Sent: 10/13/2010 04:39 PM EDT

To: Peter Silva; Nancy Stoner

Cc: Denise Keehner; David Evans; Brian Frazer; Matthew Klasen; Heidi Karp;
Kevin Minoli; Tom Laverty; Deborah Nagle

Subject: Fw: Follow up and thanks

Pete/Nancy

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES

Attached is a message from Duane Gibson, a local attorney representing the proponents of the Pebble Mine. Duane used to work on the Hill for Sen Ted Stevens and now works for the Livingston Group headed by former Congressman Livingston (LA). Duane attaches information about the mine and is requesting the opportunity to bring principals from the mining company in for a briefing on their current plans. He indicated the Administrator took time during her recent trip to AK to meet with these folks. It seems clear from the conversation that they are aware of the 404(c) petition we have received and are eager to convince EPA not to begin that process.

We can review these materials and coordinate within OW and with OGC. I'll let you know when I hear from them again requesting a meeting.

I also got a call from staff in the Alaska Governor's office forwarded by OCIR. I'll call them back and provide you with a summary of that discussion.

Best,
Greg

Gregory E. Peck
Chief of Staff
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

202-564-5778

----- Forwarded by Gregory Peck/DC/USEPA/US on 10/13/2010 04:26 PM -----

From: "Gibson, Duane" <dgibson@livingstongroupdc.com>
To: Gregory Peck/DC/USEPA/US@EPA
Date: 10/13/2010 03:28 PM
Subject: Follow up and thanks

Greg--

Thanks for returning my call today. That was appreciated. As promised, here are a few letters from tribes that indicate support for letting the process (permitting) for the Pebble Project go forward, meaning let them design a project, present it, and lay out the justifications. I thought you'd like to see these as they counterbalance somewhat the views of some who seem to have come to a conclusion already.

In addition, the letter from the governor is attached, as it is particularly well stated.

Lastly, I included a legal memo on 404c that we gave to the Regional Administrator. It is really quite good and worth the read.

Please let me know if anything comes up about the project. I will be back with you in a few weeks to set up a briefing and then we can do one with the Assistant Administrator when the executives of the company are next in DC.

Thanks.

Duane

(I've also attached my contact information.)

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES



APC letter to EPA 10-6-10.doc



EPA Letter from KSVC 10-11-10.pdf



Newhalen Tribe to EPA Oct 2010.pdf



parnell letter to jackson[1].pdf



S Naknek VC to EPA.pdf



EPA Letter McLerran2010 (2).pdf



Duane R Gibson.vcf



2600 Denali, Suite 501, Anchorage AK 99503
Phone: 907-274-2433 ♦ Fax: 907-274-8694
Email: mjnielsen@alaskapeninsulacorp.com

October 5, 2010

Dennis J. McLerran, Regional Administrator
Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
Phone: (206)553-1200 (800) 424-4372
Fax: (206) 553-2955

Re: Clean Water Act 404(c) process to prohibit certain lands from use as a disposal site
for dredged or fill material

Dear Mr. McLerran:

The Alaska Peninsula Corporation (APC) represents five villages in the Bristol Bay region, two of which are in close proximity to the proposed Pebble project. (Newhalen and Kokhanok). We believe that it is too early to draw conclusions about the Pebble project. To use antiquated mining practices that were the rule of thumb prior to the passage of the National Environmental Policy Act (NEPA) to judge mines today is nothing more than scare tactics to drive away sustainable resource development projects that are much needed for the security of our Nation as well as providing much needed jobs in poverty stricken areas in Bristol Bay.

The BBNC letter singles out Pebble when they ask to “carefully tailor a prohibition of the discharge of dredged or fill material” from the Pebble site. Their request is fraught with a bias against Pebble. There are other potential projects in Bristol Bay, some owned by the BBNC. BBNC has a conflict of interest because of that position. They cite the notion that the commercial fishery is the lifeblood of the economy of

Bristol Bay. In reality, the economy in rural villages is virtually non-existent as attested by a recent demographic study by the Alaska Federation of Natives.

We are writing you because we believe that letters to the EPA from Bristol Bay organizations like the Bristol Bay Native Corporation urging the EPA to invoke under its authority from Section 404(c) of the Clean Water Act circumvent the public process. When representatives from APC met with EPA representatives in Washington DC in 2006, they expressed concern about the growing Environmental Non-governmental Organizations (ENGO's) have in the permitting process at Pebble. We were assured that it was "Not the loudest voice but the best science" that would determine the future of projects like Pebble.

APC understands that EPA went to Dillingham to hear local concerns about Pebble. The timing of the visit coupled with the fear of public persecution by the anti mine zealots was the overriding factor in our decision not to attend the Dillingham meeting. We feel that it is imperative that you hear our views and we are proposing that we go to either Seattle or Washington in November to express to you our position so that there is no misunderstanding about our views on sustainable resource development. We are puzzled by the BBNC letter noting that they supported sustainable economic development since their inception. To condemn a project even before it files its feasibility study and application for permits is irresponsible.

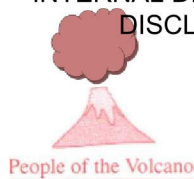
Sincerely,

ALASKA PENINSULA CORPORATION

Ralph Angasan, President

i

¹ Signature on file at the APC Office



King Salmon Tribe

P.O. BOX 68 KING SALMON, AK 99613
TEL: 907-246-3553 FAX: 907-246-3449
E-MAIL: kstvc@starband.net

Dennis J. McLerran, Regional Administrator
Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
TELEPHONE: (206)553-1200

Re: Clean Water Act 404(c) process to prohibit certain lands from use as a disposal site for
dredged or fill material

VIA Facsimile: (206) 553-2955

Dear Mr. McLerran:

The King Salmon Tribe is a Federally Recognized Tribe by the United States of America. Our home is in King Salmon, Alaska, and near the waters of Bristol Bay up the Naknek River about 13 miles. King Salmon is a place rich in culture and history, with 4000 years of salmon runs going right past our back door.

As Americans, we have some very common and fundamental principles to our existence. One of them is Due Process, partly in the legal tone, but more importantly our rights as citizens. King Salmon seeks Economic Diversity for its people, and economic diversity is crucial to our very existence. Believe us; King Salmon does not want 47% of its population living below the poverty level like our brothers, sisters, and dear friends to the North of us.

Please allow us to show you some facts on our region.

- ✓ King Salmon is about 110 Miles from Nondalton.ⁱ
- ✓ Nondalton is about 12 miles away from the Pebble Beach.ⁱⁱ
- ✓ Nondalton has approximately 47% of its population living below the poverty level.ⁱⁱⁱ
- ✓ King Salmon, by comparison, has approximately 13% of its population living below the poverty level.^{iv}
- ✓ Since 2000 Nondalton has lost 14% of its population.^v
- ✓ Since 2000 King Salmon has lost 21.5% of its population.^{vi}
- ✓ Since 2000 Dillingham has had a growth in population of 0.32% and its recorded 2010 population was 2476.^{vii}

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES

The Pebble Limited Partnership has a right to seek the necessary permits for mine development and exploration. The EPA should also consider the issues pointed to earlier, like poverty and the loss of our population. If the EPA is going to listen to the Opponents of Pebble, which are a few very vocal and powerful people, please consider King Salmon's needs also. Please do not kill a project before it even starts, because the numbers speak for themselves.

Simply, a population that works will have a lower percentage of those living in poverty. The more money people make, the better educated their children will become, as we have noticed in our village. It is our job, and not the EPA's, to teach and use subsistence activities, how we choose, to our younger generations. We are a viable people who will adapt to its environment. We are Descendants of Katmai and that means we have been doing this for the past 9,000 years.^{viii}

Our environment has not always been seemingly pristine. If you are going to take a specific time, let us say the present, then you have to be able to look at a different time in history. We are talking about the eruption of Novarupta in Katmai in 1912. The amount of pollutants, in the form of sulfur to chlorine compounds, etc., is not new to our environment.^{ix} In fact, volcano's like we have near King Salmon can have a global effect, and it is nothing compared to a proposed mine near Nondalton. We roll with the environment, and our culture has stayed intact.

It is not ironic that: "Among all this diversity, Katmai National Park and Preserve is famous for its brown bears and fish populations. Bristol Bay streams, including the Naknek River, are the source of some of the world's largest salmon runs and appear to have been so for about the last 4000 years."^x Mother Earth can be very forgiving, especially with reclamation of the natural environment.

We will participate in the public hearing process once the State of Alaska, and Federal agencies begin to hold them.

Again, we urge you, the EPA, to withhold any action on the Pebble Project until they have completed their feasibility study and the public hearing process for the project.

Sincerely,

Ralph Angasan, Sr., President
King Salmon Tribe

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES

King Salmon Tribe References, as noted.

ⁱ <http://www.citymelt.com/city/Alaska/Nondalton+City-AK.html>

ⁱⁱ <http://www.npr.org/templates/story/story.php?storyId=15053463>

ⁱⁱⁱ <http://www.citymelt.com/city/Alaska/Nondalton+City-AK.html>

^{iv} <http://www.citymelt.com/city/Alaska/King+Salmon+Cdp-AK.html>

^v <http://www.bestplaces.net/city/Nondalton-Alaska.aspx>

^{vi} http://www.bestplaces.net/city/King_Salmon-Alaska.aspx

^{vii} <http://www.bestplaces.net/city/Dillingham-Alaska.aspx>

^{viii} <http://www.nps.gov/katm/historyculture/people.htm>

^{ix} http://climate.envsci.rutgers.edu/pdf/emissions_0207.pdf

^x <http://www.katmai.national-park.com/info.htm>

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES



August 31, 2010

VIA ELECTRONIC MAIL & FedEx

Dennis J. McLerran, Regional Administrator
EPA, Region X
Regional Administrator's Office, RA-140
1200 6th Avenue, Suite 900
Seattle, Washington 98101

RE: Timing and Role of 404(c) Review

Dear Mr. McLerran:

You have received two requests asking EPA to commence an evaluation under subsection 404(c) of the Clean Water Act. They pertain to the Kvichak and Nushagak River drainages of southwest Alaska. Requestors seek to prohibit or restrict discharge of dredge spoils or fill from any "metallic sulfide mining" into any wetland or waters of those drainages. The request from six tribes (May 2, 2010) calls for evaluation of a wide geographic area, not a specified locale. The request is directed to an entire industrial category, not a particular discharge of a particular material. The request from Bristol Bay Native Corporation (August 12, 2010) is equally unrefined, initially speaking of a "carefully tailored prohibition" but never offering any made-to-measure alterations which might achieve a fitting balance.

On behalf of Pebble Limited Partnership (PLP) this firm offers the view that pursuing such amorphous 404(c) evaluations, or commencing any 404(c) review at this time, would be inconsistent with the traditional use of this statutory authority; would unreasonably appropriate decision-making customarily vested in NEPA reviewers and permitting processors; and would not be conducive to the end-goal of a 404(c) process, which is for the Administrator to determine whether a proposed discharge of specified material into a defined area will have an unacceptable adverse effect on certain enumerated resources after taking into account proposed corrective actions. For these reasons, PLP respectfully suggests that the two requests be tabled until NEPA and permit processes have run their course. At that time EPA can better ascertain whether there exists any need for a truly "tailored" restriction on any specifically defined disposal site. This suggestion is supported by the following analysis.

Direct Phone
(907) 222-7108

Direct Facsimile
(907) 222-7199

E-Mail
robert@reevesamodio
.com

500 L
STREET
Suite 300
ANCHORAGE
Alaska
99501

Telephone
(907) 222-7100
Facsimile
(907) 222-7199
Website
www.reevesamodio.com

I. BRIEF RESTATEMENT OF THE AUTHORITY

Under Clean Water Act section 404(b), the Army Corps of Engineers may specify in dredge or fill permits those areas where dredge spoils or fill may be discharged. These disposal sites are selected through application of the Army's public interest test and EPA's 404(b)(1) guidelines. 33 U.S.C. §1344(b); 33 C.F.R. §323.6, §325.2(a)(6); 40 C.F.R. Part 230. The Administrator of EPA is authorized to deny, restrict or prohibit the specification of a disposal site if, after notice and opportunity for public hearing, he or she determines that the discharge of such materials into such area will have unacceptable adverse effects on municipal water supplies, shellfish beds, fishery areas, wildlife or recreation. 33 U.S.C. §1344(c). A process to be followed by the Administrator is set-out in federal regulations. 40 C.F.R. Part 231.

II. TRADITIONAL USE OF THIS AUTHORITY

In 1979, when promulgating regulations to implement 404(c), EPA opined that this authority might be exercised at any time. The process may be invoked before a permit is applied for, while an application is pending, or after a permit has been issued. 44 Fed.Reg. 58076 (Oct. 9, 1979).¹ However, as far back as 1979 EPA felt confident that most environmental problems would be prevented through the routine operation of the permit program. *Id.* at 58,079. And, indeed, 404(c) has never been used preemptively.

The first recorded exercise was a restriction on the placement of solid waste in certain areas of the North Miami Landfill. In that case a permit had issued five years earlier, substantial deposition of garbage had already taken place, and the impacts had been quantified in actual test results. EPA stated that it was, "in effect, ... vetoing a permit [already] issued by the Corps of Engineers." 46 Fed.Reg. 10,203 (Feb. 2, 1981).

Subsequently, EPA has tried to resolve specification problems before permit issuance. This policy is based on both a concern for the plight of the applicant and a desire to protect the site before any adverse impacts occur. Indeed, Army Corps regulations now allow the permit process to continue but demand that the final permit be withheld pending resolution of any 404(c) intervention. 33 C.F.R. §323.6(b). There is no risk in waiting. Consequently, EPA has never initiated the 404(c) process before an applicant submitted his or her permit application and substantial reviews had taken place under routine permit programs.

For instance, the most recent exercise of 404(c) involves Spruce No. 1 Mine in West Virginia, a case relied upon by the six tribes in their request that Region X be "proactive." Yet EPA did not commence that 404(c) process at Spruce Mine until after the agency had

¹ Preamble to 40 C.F.R. Part 231, the 404(c) procedural regulations.

commented repeatedly on a Draft Environmental Impact Statement; had offered its assistance to the Army Corps and the permittee following a Final Environmental Impact Statement; had presented localized and specified concerns during development of a Programmatic Environmental Impact Statement; and had exercised its other authorities through both the NPDES permit process and the Dredge and Fill Permit process. *75 Fed.Reg. 16,791 at "Project History" (April 2, 2010).*

The "proactive" approach proposed by Bristol Bay Native Corporation and the six tribes is not consistent with precedent.

III. APPROPRIATE AND MEANINGFUL DECISIONMAKING

EPA's traditional approach is well founded on the words used by Congress in 404(c):

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any *defined area* as a disposal site, and he is authorized to *deny or restrict the use* of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of *such materials into such area* will have an unacceptable adverse effect *on municipal water supplies, shellfish beds and fishery areas* (including spawning and breeding areas), *wildlife, or recreational areas*. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection. (emphasis supplied)

To make any reasoned determination, there must be a "defined area" to evaluate. Most 404(c) determinations have been fairly modest in their areal extent, focused upon specific segments of waterways or particular units within a larger site. A typical example was Atlantic Richfield's (ARCO) proposal to place 112,000 cubic yards of gravel on 21.5 acres of tundra to construct a production well pad and an east-west access road near the Kuparuk River on Alaska's North Slope. Region X issued a proposed 404(c) determination for the purpose of staying activity under an already issued permit and solicited data on whether the specified discharge in the specified location would or would not cause unacceptable adverse effects on wildlife. *56 Fed.Reg. 22,161 (May 14, 1991)*. As a result of several meetings between Region 10 and ARCO, the company identified an alternative pad location and road alignment. ARCO applied for and received a modification of their Corps permit to authorize the new configuration. EPA then withdrew its proposed 404(c) determination because these modifications satisfied the Region that wildlife in the area would not be unacceptably affected. *56 Fed.Reg. 58,247 (Nov. 18, 1991)*. In contrast, the pending requests generally address two watersheds. The Kvichak River drains more than 8,000 square miles while the Nushagak River watershed encompasses

more than 12,000 additional square miles. This cannot fairly be considered a "defined area" as sought by Congress.

Before denying or restricting "the use", EPA has to know what that use will be. At a minimum the agency must have a project description on which to base "findings." So, for example, in the largest areal exercise of 404(c) to date -- a 630,000 acre Yazoo Backwater Civil Works Project -- EPA was able to focus upon particular subunits and provide particularized comments on various alternative activities because they had been identified in an Environmental Impact Statement. 73 *Fed.Reg.* 54,398 (Sept. 19, 2008). Here, the requests reference "a potential Pebble mine," which is a prospective undertaking not yet defined by any current project description.

EPA is to determine the effects of discharging "such materials into such area." The first step in this analysis is for a Regional Administrator to determine what "could result." 40 *C.F.R.* §231.1(a). The last step is to set forth written findings on the adverse effects those materials "will have." §404(c). Both steps require a particularized knowledge about the materials to be discharged and the methods of disposal into the specified site. Here, the requestors make a bald allegation that PLP's undertaking will be a "metallic sulfide mine" with "acid-generating waste rock." The term "metallic sulfide mine" is not a recognized term of art. While waste rock from a mine in the Kvichak and Nushagak River drainages may have acid-generating potential, whether it does generate will pivot on the methods and manner of discharging such material into such area. Any hypotheticals evaluated at this time would be naught but speculation.

Finally, Congress gave 404(c) a definite focus on particular types of resources. EPA looks for the effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. The broader inquiries called for under routine permit programs ought go first. As EPA noted when it first outlined this process:

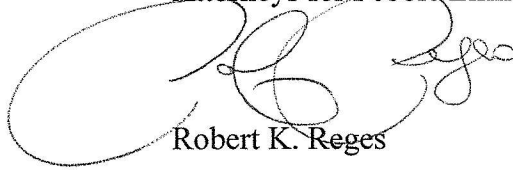
Section 404(c) authority should not be confused with the Administrator's obligation under section 309 of the Clean Air Act to comment on environmental impact statements (EIS) prepared for section 404 projects and to refer such projects to the Council on Environmental Quality when he finds them to be environmentally unsatisfactory. Comments, objections to Corps permits, and CEQ referrals may be based on any kind of environmental impact. On the other hand, 404(c) authority may be exercised only where there is an unacceptable adverse effect on municipal water supplies, shellfish, fisheries, wildlife or recreation. 44 *Fed.Reg.* at 58076.

In sum, subsections 404(b) and (c) involve "specification." The goal of 404(c) is to identify those impacts that are "unacceptable" because they are "likely to result in significant degradation." §231.2(e). EPA has the burden of proving, with written findings of fact, its "basis

for any determination of unacceptable adverse impacts." 44 Fed.Reg. at 58080. The level of certainty is that such materials "will have" these impacts when discharged into the "defined area." Such conclusions require a level of knowledge typically developed during NEPA review and routine permit processing. Accordingly, 404(c) has become known as EPA's "veto" authority, not EPA's preliminary authority. Reasoned exercise of this extraordinary, discretionary program² strongly suggests that it be held in abeyance unless and until a measure of last resort is required to correct particularized problems in specified areas.

Sincerely,

REEVES AMODIO LLC
Attorneys for Pebble Limited Partnership



Robert K. Reges



for

Susan E. Reeves

:ser
cc: Client

² "By statute, the Administrator is authorized rather than mandated to overrule the Corps. 33 U.S.C. §1344(c). Because this power is discretionary, the citizen suit provision of the Clean Water Act does not apply." *Preserve Endangered Area of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1249 (C.A. 11[Ga.] 1996).

But see, *South Carolina Coastal Conservation League v. U. S. Army Corps of Engineers*, 2008 WL 4280376, *5-*8 (D.S.C. 2008)(citing cases in accord with *Cobb's History* but ultimately concluding that it was bound by a 4th Circuit decision it deemed to have recognized a "duty" of "oversight imposed by Section 1344(c).").

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES

Newhalen Tribal Council
P.O. Box 207
Newhalen, Alaska 99606
(907) 571-1410

October 10, 2010

Dennis J. McLerran, Regional Administrator
Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
Phone: (206)553-1200 (800) 424-4372
Fax: (206) 553-2955

Re: Clean Water Act 404(c) process to prohibit certain lands from use as a disposal site for dredged or fill material


Dear Mr. McLerran;

The Newhalen Tribal Council is located near the Pebble deposit in the Iliamna Lake. We believe that it is too early to draw conclusions about the Pebble project. To use antiquated mining practices that were the rule of thumb prior to the passage of the National Environmental Policy Act (NEPA) to judge mines today is nothing more than scare tactics to drive away sustainable resource development projects that are much needed for the security of our Nation as well as providing much needed jobs in poverty stricken areas in Bristol Bay.

We are writing you because we believe that letters to the EPA from Bristol Bay organizations like the Bristol Bay Native Corporation urging the EPA to invoke under its authority from Section 404(c) of the Clean Water Act circumvent the public process. When representatives from our village corporation, the Alaska Peninsula Corporation (APC) met with EPA representatives in Washington DC in 2006, they were assured that it was "Not the loudest voice but the best science" that would determine the future of projects like Pebble.

We feel that it is imperative that you hear our views and we are proposing that we go to either Seattle or Washington in the near future to express to you our position so that there is no misunderstanding about our views on sustainable resource development. We are puzzled by the effort by the anti mine zealots seeking action to stop Pebble at this early juncture. We believe that the permitting process will determine whether the mine can co-exist with other uses of the land in Iliamna. To condemn a project even before it files its feasibility study and application for permits is irresponsible.

Sincerely,



Raymond Wassillie
President

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES

STATE CAPITOL
PO Box 110001
Juneau, Alaska 99811-0001
907-465-3500
fax: 907-465-3532



550 West 7th Avenue #1700
Anchorage, Alaska 99501
907-269-7450
fax 907-269-7463
www.Gov.Alaska.Gov
Governor@Alaska.Gov

Governor Sean Parnell
STATE OF ALASKA

September 21, 2010

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Jackson,

I am writing regarding the petition your agency received from six federally recognized tribes to initiate the Clean Water Act Section 404(c) process to prohibit or restrict discharges of dredged or fill materials, including mine tailings, within the watersheds that would include the Pebble Mine. I ask that you decline to invoke Section 404(c) at this time for reasons I will explain.

Let me begin by assuring you that we share a goal of protecting the waters, wetlands, fish, wildlife, fisheries, subsistence, and public uses of the Bristol Bay watershed. This area is home to bountiful natural resources and beauty including vast runs of sockeye and other pacific salmon that support immensely valuable commercial, subsistence, and sport fisheries. As Governor, I will do everything in my power to see that any new development fully protects the resource values of the area, and does not come at the expense of what we have today.

While I understand and share the petitioners' desire to protect the resources in Bristol Bay, I disagree that invoking the 404(c) process at this time would contribute to that goal. At best, it would waste agency and public time and resources. At worst, it would work against our mutual aims. I offer the following thoughts for your consideration.

A premature 404(c) determination effectively prohibiting mining in the area would impinge on State land use planning authority. Much of the land in the Bristol Bay area belongs to the State of Alaska. We have completed several iterations of land planning for these lands including exhaustive public outreach and deliberations to find a balance between competing interests and potential land uses. While we recognize that initiating the 404(c) process does not necessarily lead to a particular outcome, even the possibility that the process would conclude with a prohibition against mining over vast expanses of State lands causes us great concern. Federal preemption of traditional State land use authority is an alarming prospect to say the least. To start with, it would undo years of planning effort, but the effects do not stop there. There has been tremendous investment in the area based on the potential for mineral development. We cannot fathom the liability and legal challenges that could accompany

an unprecedented, after-the-fact determination by the federal government that mineral development from these State lands is no longer viable.

Clean Water Act Section 404(c) offers no protections beyond those included in the Clean Water Act Section 404(b)(1) permit process. The regulations that implement the two parts of the Clean Water Act include virtually the same prohibitions, and call for virtually the same analyses and findings. Where Section 404(c) rules prohibit “unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas,” the Section 404(b)(1) rules prohibit “significantly adverse effects . . . on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites” as well as “recreational” and “aesthetic” “values.” The prohibitions and standards are very similar. The difference, of course, is that you are being asked to invoke Section 404(c) now ahead of any environmental planning and permitting processes, whereas the Section 404(b)(1) process would come later as part of the permit process for Pebble or another mine. The fact remains that Section 404(c) does not offer any more protection for area resources than does Section 404(b).

The record is currently insufficient to support the findings demanded by the 404(c) process, and could not begin to approach the record that will exist upon completion of the National Environmental Policy Act (NEPA) and permit processes that would be required for new mine development. As already mentioned, the 404(c) process hinges on the Environmental Protection Agency (EPA) deciding whether there will be “unacceptable adverse impacts” on “municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” The environmental planning and permitting process for the Pebble Mine alone will necessarily produce volumes of studies and information that would allow for fully informed decisions about potential impacts from mining in the area.

Not enough is known about mine plans in the area to gauge impacts as required by the 404(c) process. State and federal agencies have yet to receive designs or permit applications for the Pebble Project, or any other major mine in the Bristol Bay area. Without a specific proposal, EPA cannot evaluate the potential impacts or risks from the project. We do not know where facilities would be located, which wetlands might be impacted, or what the characteristics of the dredged or fill material would be.

A meaningful 404(c) process cannot be concluded in the time frame envisioned by the regulations. While the 404(c) process can be initiated before receipt of a permit application, the normal course would begin with a notice of a proposed determination by the Regional Administrator and conclude with a final determination by the Administrator approximately five months later. We recognize that time frames can be extended for good cause, but doubt that anyone envisioned extending the process over the multiple years it would take to collect information, complete the impact analyses, and develop a sound record on a par with what we could expect from the NEPA and permit processes for a new mine development proposal.

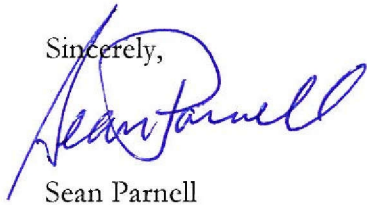
The 404(c) process would short change public participation. The public notice and opportunity for comment and hearing associated with the 404(c) process could not rival the outreach, education, consultation, and other public involvement that would occur should the Pebble Mine or another mine advance to the NEPA and permitting phase.

A premature 404(c) determination effectively prohibiting mining in the area would disproportionately impact rural residents and Alaska Natives. Approximately 70 percent of area residents are Alaska Native (2009). Seventeen percent fall below the poverty level (2008). The area has seen an 18 percent population decline in the last ten years. Knowing of your keen interest in the effects of EPA decisions on disadvantaged populations, we hope you would take into account that a 404(c) decision to preclude mining in this economically depressed region would abruptly and conclusively deny area residents any opportunity to avail themselves of the benefits they might seek from responsible mining.

The intended purpose and true utility of the 404(c) process is in addressing actual or imminent adverse effects where the NEPA and permit processes have failed or where there is reason to believe that they will fail. In essence, the 404(c) process is best used as a backstop for the other applicable provisions of Section 404, including application of the 404(b)(1) guidelines and the interagency coordination and dispute resolution procedures developed pursuant to 404(q). There is no purpose or advantage to initiating the process now.

For these reasons, I firmly believe initiating a 404(c) process would be ill-advised and potentially contrary to our shared goal of protecting area resources. I would appreciate your taking our concerns into account. If there is anything else we can do to assist you, please contact my office at 907-465-3500.

Sincerely,



Sean Parnell
Governor

cc: The Honorable Lisa Murkowski, U.S. Senate
The Honorable Mark Begich, U.S. Senate
The Honorable Don Young, U.S. House of Representatives
Dennis McLerran, Regional Administrator, EPA Region 10
John Katz, Director State and Federal Relations, Office of the Governor

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES

South Naknek, Alaska, 99670

October 7, 2010

Dennis J. McLerran, Regional Administrator
Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
Phone: (206)553-1200 (800) 424-4372
Fax: (206) 553-2955

Re: Clean Water Act 404(c) process to prohibit certain lands from use as a disposal site for dredged or fill material

Dear Mr. McLerran;

The South Naknek Tribal Council is a federally recognized tribe in the watershed of the Bristol Bay region and downstream from the proposed Pebble project.

We support due process and believe that the Pebble Limited Partnership has a right to seek permits without political intervention. It is too soon to draw conclusions about the mine. We will participate in the public hearing process once the state and federal agencies begins to hold them to determine if the mine can coexist with existing uses of the lands in Bristol Bay.

Again, we urge you to withhold any action on the Pebble Project until they have completed their feasibility study and the public hearing process on the project begins.

Sincerely,

South Naknek Village Council

Signature on file at the South Naknek Tribal Council office